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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 74

ANTHONY VESPOLE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 5 Misc.

SALVATORE TANUZZO AND NUNZE DELLARATTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 1040-1047) is reported at 174 F. 2d 177.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1949 (R. 1048), and petitions for rehearing (R. 1049-1065) were denied on April 29, 1949 (R. 1066-1067). Petitioner Vespole filed his petition for a writ of certiorari on May 16, 1949. On May 20, 1949, Mr. Justice Jackson extended the time of petitioners Tanuzzo and Dellaratta for filing a petition for a writ of certiorari to June 28, 1949, and their petition was filed in forma pauperis on June 1, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction of petitioner Vespole of the substantive offense of causing the transportation of stolen fur coats from New York to New Jersey.

2. Whether the evidence was sufficient to sustain the conviction of petitioner Dellaratta of the substantive offense of causing the transportation of stolen fur coats from New York to New Jersey and of conspiracy to commit that offense.

3. Whether petitioners were unduly prevented from attacking the credibility of a government witness by showing he was under the influence of narcotics at the time he was testifying.

4. Whether the admission in evidence without timely objection of an explanatory and unre-

sponsive statement by petitioner Vespole on cross-examination indicating that either petitioner Tanuzzo or petitioner Dellaratta or both had a criminal record was reversible error as to them.

5. Whether an unrequested instruction admonishing the jury not to draw any unfavorable inference against a defendant as a result of his exercise of his legal right not to testify was reversible error as to Tanuzzo and Dellaratta, who did not take the stand.

6. Whether Tanuzzo and Dellaratta were properly sentenced under the conspiracy provision of the National Stolen Property Act, and whether the imposition of sentences immediately after conviction over their protest violated their right to present information to the court in mitigation of punishment.

7. Whether the trial judge abused his discretion in denying petitioners' motions for a new trial.

STATUTE INVOLVED

The National Stolen Property Act of May 22, 1934, 48 Stat. 794, as amended by the Act of August 3, 1939, 53 Stat. 1178, provided as of the dates involved in this case:

> Sec. 3 [18 U. S. C., 1946 ed., 415] Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen,

feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: * * *.

Sec. 7 [18 U. S. C., 1946 ed., 418a] If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

STATEMENT

Petitioners Vespole, Tanuzzo and Dellaratta were indicted with six others in the District Court for the Southern District of New York for causing certain stolen fur coats to be transported in interstate commerce, knowing them to have been stolen. In another indictment returned at the same time, petitioners and four of their codefendants named in the substantive indictment were charged with conspiracy to cause such transportation. (R. 21-25.) After a consolidated jury trial and conviction, Tanuzzo was sentenced to imprisonment for 10 years on the substantive indictment and 5 years on the conspiracy indictment, to be served consecutively. Dellaratta received a sentence of 10 years on each indictment, to be served concur-

rently. Vespole was sentenced to 8 years' imprisonment on each indictment, the sentences to run concurrently. (R. 594.)

On appeal, the convictions of Tanuzzo and Dellaratta on both indictments were affirmed. Vespole's conviction on the substantive indictment was affirmed, but his conviction on the conspiracy indictment was reversed. (R. 1048.)

The testimony adduced on behalf of the Government is as follows:

In the fall of 1946, two employees of Revillon Freres—defendant De Satnick, a truck driver, and defendant Schneiderman, a helper—planned to steal a truck load of furs belonging to their employer (R. 48-53). De Satnick, a witness on behalf of the Government, testified that since Schneiderman was not assigned as his helper, they decided that "outside help" would be needed and Schneiderman was designated to procure such assistance. The "outsiders" were to steal the load of furs and "sell them and get rid of them for us." (R. 126-129.) Early in November 1946, Schneiderman made arrangements with Vespole, Tanuzzo, Dellaratta, and defendant Aurecchione, who died before the trial (R. 28), to perpetrate the robbery and Schneiderman so advised De Satnick (R. 53-54). De Satnick had known these men for about three years as persons whom he had met in the neighborhood of Sackman Street and Pitkin Avenue in East New York (R. 55). In discussing the

arrangements prior to the robbery, Schneiderman told De Satnick that De Satnick "figured to be with Vespole and he would take care of the money deal" (R. 129). On November 10, 1946, De Satnick met Vespole in a bar and introduced himself as the fellow Schneiderman had told Vespole about. At that time, De Satnick told Vespole he would "let him know two or three days before I thought I had a good truckload." (R. 56.) On November 18, De Satnick told Schneiderman he would have a good load the next day and a meeting with the others was arranged. That evening De Satnick met Schneiderman, Vespole, Tanuzzo, Dellaratta, and Aurecchione at a luncheonette at Howard Avenue and St. John's Place, and they went for a ride in Aurecchione's car, a gray 1941 Buick convertible. During the ride arrangements were made for the holdup and signals were arranged between De Satnick and Vespole whereby the latter would be informed of the route the truck would take. (R. 56-60.)

The next day, Tuesday, November 19, 1946, while De Satnick was loading 300 fur coats on his truck, Vespole passed by and De Satnick told him, "O.K." Later he signaled Vespole that he was going down 8th Avenue. (R. 62-63.) At 31st Street and 8th Avenue De Satnick stopped for a traffic signal and Vespole boarded the truck, took out a gun, and ordered De Satnick and his helper, Mancuso, to follow his directions. As Vespole

piloted the truck it was followed by the gray 1941 Buick convertible that had been used the previous evening in planning the robbery (R. 68). At Hoyt and Wyckoff Streets in Brooklyn, Vespole ordered De Satnick and Mancuso to get out of the truck and into the Buick. At the same time Tanuzzo and Dellaratta boarded the truck. Vespole and Aurecchione drove De Satnick and Mancuso around for three hours in the Buick and released them, at the same time threatening them and their families if they identified their assailants or the Buick. (R. 63-66, 134-139.)

The next day, November 20, Schneiderman told De Satnick a "fence" had counted 260 coats and had offered $20,000 for them but that "they" thought he was cheating them. That evening De Satnick saw Tanuzzo and told him there were 300 coats. About two weeks later, early in December 1946, De Satnick inquired about the money from the robbery and Schneiderman told him that the stuff was "too hot" and that "they" could not get rid of it. Schneiderman kept in touch with the others by telephone and later he told De Satnick he "had called them up and that they are working on it." About one week thereafter De Satnick saw Vespole and Aurecchione sitting in the Buick parked in front of the luncheonette where the group had met the night before the robbery and, although they tried to elude him, he followed them until they stopped. He asked them, "what is the score," and

Aurecchione said "that the stuff is hot, they are moving it from one drop to another and it is costing them some money, I should not worry, everything will be all right." (R. 69-71.) Thereafter, De Satnick saw Tanuzzo in a theater and Tanuzzo told him that the "stuff" (i. e., the furs) had been found by the police in New Jersey (R. 76); that De Satnick "should not worry about anything, that he [Tanuzzo] is going to get—they are going to go down and try to get the money, because it is the fence's fault that the truck ran out of gas" (R. 72).

Meanwhile, in the latter part of November 1946, defendant Felstein, who owned a night club in Newark, New Jersey, told defendant Grossman, who testified on behalf of the Government, that he knew "some fellows in Brooklyn that had some furs" and asked Grossman if he would sell them (R. 159-160, 163-164). The same night Felstein, Grossman, Aurecchione and defendant Maislich met in Felstein's night club. Felstein introduced Aurecchione to Grossman. Maislich asked Grossman if he could "get rid of some furs." (R. 165-167.) The next day Grossman went to Brooklyn and met Maislich and Aurecchione, who took him in the Buick convertible to the place where the furs were stored and there introduced him to Tanuzzo and Dellaratta (R. 167-170). Grossman then returned to Newark and told Felstein, "There is 250 coats there." That night Felstein and Grossman met Aurecchione and a man whom Grossman could

not recall in Newark and Felstein agreed to pay $15,000 for the coats. (R. 171-172.) On December 11, 1946, Felstein and Grossman borrowed a truck from Shapiro and Tunkel, grocers in Elizabeth, New Jersey, and Grossman drove to Brooklyn to get the coats (R. 173-176). Grossman was met by Aurecchione, who took him to the "drop." Aurecchione, Tanuzzo, Dellaratta and an unidentified man loaded the coats onto the truck and Aurecchione told Grossman he would follow him to New Jersey. Grossman was guided to the Holland Tunnel, but on the Pulaski Skyway he lost the convoyers and the truck broke down near Harrison, New Jersey. (R. 176-179.) He went to Felstein's night club, met Aurecchione, Tanuzzo and Felstein, and told them what had occurred (R. 180). Aurecchione, Tanuzzo, Felstein and Grossman went to look for the truck in the Buick convertible and saw it parked in front of Hudson County police headquarters (R. 180-181). Shapiro and Tunkel were told of what had happened and agreed to say the truck had been stolen (R. 182-183, 227-228, 237-239). The next day, Aurecchione, Tanuzzo, Dellaratta and an unidentified man went to Newark and talked to Grossman about getting their money for the furs from Felstein (R. 183-184).

The police found 159 fur coats in the truck (R. 257), which were later identified as having been among those stolen from Revillon Freres (R. 266-

272) and were valued at approximately $75,000 (R. 277-284).

At the time of these events, Vespole was working for International General Electric Company in New York City. The records of that company indicated that he was absent on Friday of the week ending Sunday, November 10, 1946, on Monday, Thursday, Friday and Saturday of the week ending November 17, all of the week ending November 24,[1] and on December 11, 1946, the day part of the stolen furs were transported to New Jersey. (R. 245-248.)

Two New York detectives testified that in the latter part of January 1947 they had observed Vespole, Dellaratta and Aurecchione riding around Brooklyn at 2:30 or 3:00 o'clock in the morning, and that they stopped them. Vespole was driving a 1941 Buick coupe, which was registered in his name. (R. 489-497, 506-510.)

Vespole testified in his own behalf and admitted that he had known Tanuzzo and Dellaratta for some time prior to the robbery (R. 369-371, 389); that on December 23, 1946, he had purchased a 1941 Buick club coupe for $1,400 (R. 366, 378-379, 400); and that shortly after the purchase of the car he had been in the company of Tanuzzo and Dellaratta (R. 384, 389, 391-394, 400).

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[1] The robbery of Revillon Freres' truck occurred on Tuesday, November 19.

Petitioners filed motions for a new trial on the ground of newly discovered evidence that Grossman had perjured himself at the trial. An extensive hearing was held on the motion at which both sides adduced evidence. (R. 595-1016.) The trial judge made detailed findings of fact adverse to petitioners and denied the motion (R. 1017-1026).

ARGUMENT

1. The Court of Appeals held that there was insufficient evidence to show that petitioner Vespole "knew of the plan, which later developed, to take the furs to New Jersey for delivery to Felstein" and that, although Vespole had a stake in the furs and probably would have been willing to have them sold outside of New York, such a relation to the conspiracy to transport the furs to New Jersey was insufficient to render him guilty of that offense. In respect of the substantive offense of causing the transportation, the court said that under the statute proof of knowledge on Vespole's part that the stolen goods *were to be* transported interstate was not required; that it was only necessary to show that "he knew that the goods had been stolen and that he caused them to be thus transported." The court said the evidence indicated that Vespole delivered the furs which he had stolen to Tanuzzo and Dellaratta to sell for "joint account, without limitation as to where the sale was to be made," and it held that on such evidence the jury was justified in finding that Vespole caused the transportation

when one of his confederates arranged to sell the furs to Felstein in New Jersey. (R. 1043.)

Vespole contends here that in view of the holding below in respect of the conspiracy indictment, the substantive charge must also fail for insufficiency of the evidence (Pet. 8), and that the court below was wrong in holding that because he "turned over the stolen goods to others, who three weeks later, without his knowledge or participation, first determined to, and did, transport them in interstate commerce," he is "amenable to Federal prosecution for having 'caused' the interstate transportation of the goods" (Pet. 9-11).

We disagree with Vespole's contention and with his analysis of the opinion below. In affirming Vespole's conviction of the substantive offense, the Court of Appeals did not rest its decision merely on the fact that Vespole himself stole the furs; it relied upon the indisputable fact that he was jointly interested with the others in the proceeds to be derived from sale of the furs and it held that this interest supplied, as to him, the element of causation.

Vespole's contention, and, to a lesser degree, the decision below reversing his conviction on the conspiracy charge while affirming his conviction of the substantive offense, are based upon the hypothesis that there was no proof connecting him with the transportation itself. We submit that as to both offenses the controversy involves nothing more

than the sufficiency of the evidence to support the jury's verdict of guilty on the two indictments; and on that issue we think the evidence amply supports the verdict in both respects.

Vespole was not merely a thief who turned his loot over to others who thereafter transported it interstate to suit their own convenience. The whole affair, from beginning to end, was a joint venture in which he was a principal participant. He was one of the original "outsiders" whom Schneiderman enlisted to stage the robbery of the truck. Vespole, with Tanuzzo, Dellaratta and Aurecchione, made the first tentative arrangements with Schneiderman, and later De Satnick told Vespole alone that he would let Vespole know when he would have a "good load." In their discussions prior to the robbery concerning division of the spoils with the "outsiders," Schneiderman told De Satnick that Vespole "would take care of the money deal."[2] Vespole participated with his im-

[2] Vespole disputes (Pet. 10) this interpretation of De-Satnick's testimony. At the time De Satnick gave this testimony he was being questioned on direct examination concerning his discussions with Schneiderman prior to the robbery as to what the outsiders were to do. He said that "They were supposed to sell them [the furs] and get rid of them for us." (R. 128-129.) He was then asked what he had said to Schneiderman about that and he replied, "Nothing. I didn't say anything." The next question was, "And what did Schneiderman say to you about that, if anything?" and he replied, "That I figured to be with Vespole and he would take care of the money deal." (R. 129.) De Satnick did not purport to be quoting Schneiderman. We think the natural construction of De Satnick's answer is that the pronoun "I" referred to De Satnick and the pronoun "he" referred to Vespole.

mediate confederates—Tanuzzo, Dellaratta and Aurecchione—in completing the arrangements with De Satnick and Schneiderman the night before the robbery. Vespole himself held up the truck and piloted it to a rendezvous with Tanuzzo, Dellaratta and Aurecchione. Vespole and Aurecchione held De Satnick and Mancuso captive in Aurecchione's car before releasing them under threats not to disclose the identity of the robbers. Thereafter, when De Satnick became uneasy about his share, Aurecchione told him in Vespole's presence that the furs were "hot" and that "they" were moving them around from one "drop" to another. Although Vespole did not say anything to De Satnick on this occasion (R. 71), it is clear that he was familiar with the efforts to sell the loot. This incident occurred around mid-December 1946, close to the time the furs were transported to New Jersey. Vespole was seen by two detectives in suspicious circumstances in the company of Aurecchione and Dellaratta in January 1947, a little more than a month after the transportation. The evidence thus showed that Vespole was closely associated with Aurecchione both before and after the transportation, and Aurecchione was the principal negotiator in the abortive effort to sell and transport the furs to Felstein in New Jersey.

In addition, it was shown that Vespole was absent from his job most of the week preceding and all of the week in which the robbery occurred, as

well as on December 11, 1946, the day the furs were transported to New Jersey. Only about half of the stolen furs were recovered from the truck Grossman drove to New Jersey; and less than two weeks after the New Jersey fiasco, when that truck fell into the hands of the police, Vespole bought for $1400 the car which he was later seen driving around Brooklyn at 3:00 a. m. in the company of Aurecchione and Dellaratta.

True, there was no direct evidence connecting Vespole with the negotiations with Felstein and the transportation to New Jersey.[3] But the totality of the circumstances which we have reviewed above strongly supports the inference that he was a party to the arrangement to sell the furs to Felstein and thus in a very real sense a party to causing the transportation. The finding of a defendant's knowledge must of necessity in many instances rest upon inference rather than direct evidence. *McGunnigal* v. *United States*, 151 F. 2d 162, 166 (C.A. 1), certiorari denied, 326 U. S. 776. Thieves do not steal merely for the sake of stealing, but

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[3] In this connection it should be noted that Grossman testified to the presence of "someone else I don't recall" (R. 172), an "unidentified fellow" (R. 177), and "another fellow * * * I can't identify" (R. 184) on the occasions, respectively, when Aurecchione met Felstein and Grossman in Newark the night before the transportation and arranged the terms of sale, when Aurecchione, Tanuzzo and Dellaratta loaded the furs onto Grossman's truck to be taken to New Jersey, and when Aurecchione, Tanuzzo and Dellaratta talked to Grossman the day after the transportation about getting the money for the furs from Felstein. Vespole, it will be recalled, held up De Satnick's truck at the point of a gun.

for what they can realize on their loot. Vespole himself was the man among this group of confederates who was selected to hold up De Satnick's truck. Obviously, he had a large stake in the proceeds to be realized from sale of the furs and it strains credulity to assert that he had nothing to do with them after the robbery. The logical and natural inference to be drawn from all the evidence is that Vespole's association in the nefarious enterprise continued to the end. The trial judge was therefore warranted in submitting to the jury both of the charges against Vespole.[4] And since the Court of Appeals has found the evidence sufficient to support his conviction of the substantive offense, albeit on a theory which he assails here, we submit that there is no occasion for further review of this issue.

What we have said indicates our disagreement with the Court of Appeals in holding the evidence insufficient to support Vespole's conviction on the conspiracy charge. Furthermore, consideration of

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[4] The jury convicted Vespole of conspiracy under a charge by the court that "there can be no conspiracy to cause stolen goods to be transported in interstate commerce unless it is understood to be a part of the project that they shall cross State lines" (R. 566, 580). In respect of the substantive indictment, the court gave the following charge: "As to Indictment 125-470, the substantive offense, it is essential to a verdict of guilty that the jury find that the defendants caused to be transported in interstate commerce, via Brooklyn, New York, and through the Southern District of New York, to New Jersey, the merchandise, to wit, the fur coats having a value of $5000 or more theretofore stolen, knowing the same to have been stolen." (*ibid.*)

that question was unnecessary in view of the affirmance of his conviction on the substantive indictment, since his sentences of 8 years on each indictment were ordered to run concurrently. *Hirabayashi* v. *United States*, 320 U. S. 81, 85. For the same reason, the Government has not sought review here of the Court of Appeals' reversal of Vespole's conspiracy conviction.

2. Petitioner Dellaratta's contention that, under the theory of the Second Circuit's decision in *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2),[5] there was insufficient evidence to support his conviction, is frivolous. Dellaratta was a participant in the planning of the robbery and the theft of the furs. He was present when Grossman was taken to the hideout to inspect the loot so that he could report its amount and condition to Felstein. He was one of those who helped Grossman load the furs into the truck borrowed from the two New Jersey grocers. At that time, if not before, no doubt could have existed in his mind as to the destination of the furs, for Aurecchione said to Gross-

[5] In that case the court below reversed Crimmins' conviction of conspiracy to transport stolen securities in interstate commerce. Crimmins was shown to have bought some of the securities from one of the conspirators under circumstances indicating that he knew they had been stolen. There was no evidence, however, that Crimmins knew where the securities were stolen. The court held that "there can be no conspiracy to 'cause' stolen securities 'to be transported in interstate * * * commerce' unless it is understood to be a part of the project that they shall cross state lines." 123 F. 2d at 273-274. Compare the trial judge's charge in the instant case, footnote 4, *supra*.

man in his presence, "I'll follow you into Jersey" (R. 177). The next day he was among those who went to New Jersey to see Grossman about payment for the furs from Felstein. In these circumstances, there was certainly sufficient proof to sustain Dellaratta's conviction of both the conspiracy and the substantive offense, and the principle of the *Crimmins* case has no application.

3. All the petitioners contend that they were unduly restricted in their cross-examination of government witness Grossman in respect of his addiction to narcotics. At the outset of Grossman's direct examination, defense counsel were permitted to examine him on *voir dire* to ascertain whether he was then under the influence of narcotics (R. 160-163). At that time the trial judge found that Grossman was able to "testify intelligently and normally" (R. 162). On cross-examination, Grossman testified to prior narcotic addiction up to the time of his arrest. He was then asked, "Now, how did you take dope, or how do you take dope?" (R. 189.) Upon objection, defense counsel stated the reason for the question was "to lay the foundation for the possible use of a physician." The objection was sustained on the ground that the court was not concerned with how Grossman took drugs at some prior time. (R. 189-190.) Thereafter, the witness was subjected to a searching cross-examination concerning his narcotic addiction, both past and present, and steadfastly denied the imputation

that he was then under the influence of narcotics (R. 190-192). While *Wilson* v. *United States*, 232 U. S. 563, and other authorities cited by petitioners hold that cross-examination as to the present use of drugs is permissible because, if a witness testifies while under the influence of narcotics, that fact may have a material bearing upon his reliability as a witness, it is evident that petitioners were not shut off from such an inquiry. The *manner* in which the witness had previously taken narcotics could in no way have affected his present credibility, and petitioners could not have desired the information to use in employing a physician to testify as to that, since he had testified on *voir dire* that he had used the hypodermic method (R. 162). In any event, no attempt was made to rebut Grossman's testimony that he was not under the influence of narcotics and no effort was made to obtain an order requiring him to submit to a medical examination.

4. Petitioners Tanuzzo and Dellaratta contend that they were prejudiced by the admission of evidence that they had criminal records, although they had not testified on their own behalf or put their character in evidence. The contention is based upon the following incident: During the course of the cross-examination of Vespole, the prosecutor inquired concerning an occasion when Vespole was driving in New Jersey with Tanuzzo and Dellaratta. The prosecutor asked Vespole where he was going

at that time. Vespole said they were going "just for a ride" and then began to say that they were stopped and questioned by a New Jersey State Trooper. At that point he was interrupted by the prosecutor, who sought to shut off further response. Despite the fact that further explanation was not responsive to the question, Vespole's attorney insisted that he be permitted to complete his statement. As a result, Vespole testified that they were charged as disorderly persons and that a week later he received a suspended sentence on that charge and discovered "that under the Jersey law that it is an offense to be with any person that has a record." At that time no objection or motion to strike as to them was interposed by counsel for Tanuzzo and Dellaratta, but at the next recess their counsel unsuccessfully moved for a mistrial. (R. 386-389, 395.) No requests were made for instructions to the jury regarding the effect of this testimony.

Vespole's reference to "any person that has a record" did not identify either Tanuzzo or Dellaratta and did not indicate the nature of the "record." In view of the convincing evidence of the guilt of Tanuzzo and Dellaratta, it is difficult to understand how this indirect and indefinite reference to a criminal record could have prejudiced them.

5. Petitioners Tanuzzo and Dellaratta contend that the unrequested instruction as to the right of a defendant not to testify and admonishing the

jury that, under the law, they should draw no inference unfavorable to such a defendant (R. 572) was so prejudicial as to require reversal, even though they made no objection to it. In view of the provisions of 28 U.S.C. (1946 ed.) 632[6] and the decision of this Court in *Bruno* v. *United States,* 308 U. S. 287, holding that the instruction in question is one to which a defendant is entitled on request and that failure to give it on request is reversible error, it is difficult to perceive in what manner these petitioners were harmed. Since the decision in the *Bruno* case, two other Courts of Appeals have held that it was not error for a court to give such an instruction of its own motion. *Smith* v. *United States,* 112 F. 2d 217 (C.A. D. C.), certiorari denied, 311 U. S. 663; *Chadwick* v. *United States,* 117 F. 2d 902 (C.A. 5), certiorari denied, 313 U. S. 585. No decision to the contrary has been found.

Moreover, petitioners' failure to comply with Rule 30, F. R. Crim. P., and voice an objection to that portion of the charge at the time it was given is a fatal defect in their contention, since the trial court was afforded no opportunity to correct its mistake, if one in fact existed.

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[6] "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

6. Petitioners Dellaratta and Tanuzzo also contend (a) that they were denied a right under Rule 32(a), F. R. Crim. P., to present information to the trial court in mitigation of punishment, and (b) that the imposition of sentences in excess of two years on the conspiracy convictions was improper. Neither contention is meritorious.

(a) Rule 32(a) provides that "Sentence shall be imposed without unreasonable delay" and only requires the trial judge, before imposing sentence, to afford the defendant "an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." The rule does not give a convicted defendant any right to delay in the imposition of sentence. Both petitioners were accorded the opportunity required by the rule, but they declined to exercise it (R. 588). The court was interested principally in the previous criminal records of petitioners and the other defendants, and these records were set forth in a statement by the prosecutor after defense counsel had been afforded the opportunity to examine the records (R. 585-587).

(b) Section 7 of the National Stolen Property Act was a special provision dealing with conspiracies to violate the act and authorizing the same penalties as were provided for substantive offenses, i.e., imprisonment for not more than 10 years, or a fine of not more than $10,000, or both. As to such conspiracies, Section 7 superseded the general con-

spiracy statute (Sec. 37 of the Criminal Code, 18 U.S.C., 1946 ed., 88), which provided a maximum imprisonment penalty of 2 years. The sentences imposed on petitioners are therefore within the maximum allowed under the applicable statute.[7] Although there is a slight difference in wording between the statutes, the difference does not justify these petitioners' construction that the increased punishment is applicable only to those conspirators who committed overt acts.[8] Nor are petitioners aided by the fact that the indictment and charge to the jury referred to 18 U.S.C. 88 rather than Section 7 of the National Stolen Property Act, since the elements of the offenses denounced by both sections are identical, the only difference being in their scope, one being a general and the other a special statute. See Rule 7(c), F. R. Crim. P.

7. All the petitioners contend that the Court of Appeals erred in refusing to overrule the trial court's denial of their motions for a new trial. The burden rests upon petitioners clearly to establish an abuse of discretion by the trial court. *McDonnel* v. *United States,* 155 F. 2d 297 (C.A. D. C.); *Hel-*

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[7] Petitioner Tanuzzo received a sentence of 5 years on the conspiracy conviction, to be served consecutively to the 10-year sentence imposed for the substantive offense. Petitioner Dellaratta received a 10-year sentence for each offense, but they run concurrently, as do Vespole's 8-year sentences. The latter two thus have no basis for complaint on this score.

[8] In any event, the evidence conclusively shows that both Dellaratta and Tanuzzo committed overt acts in furtherance of the objects of the conspiracy. Both helped load the truck bound for New Jersey.

wig v. *United States,* 162 F. 2d 837 (C.A. 6). Accordingly, petitioners assert that there was no evidence to support the trial judge's findings. The motions for a new trial were based upon the claim that the witness Grossman lied when he testified that he was not under the influence of narcotics at the time of the trial and that there had been no "deal" between him and the prosecutor as to the degree of his punishment. In addition, Dellaratta complains that the trial court refused to receive and consider evidence as to whether Grossman mistakenly or otherwise testified falsely regarding Dellaratta's presence in Newark on December 12, 1946, when an effort was made to secure payment from Felstein for the furs which had fallen into the hands of the police.

The record shows that petitioners were accorded a complete and lengthy hearing on the merits of their motions for a new trial,[9] and at its conclusion the trial judge prepared an opinion containing 22 findings of fact, all of which are supported by evidence. Thus, the prosecutor testified as to Grossman's physical appearance at the time of his arrest and the marked improvement therein at subsequent dates (R. 953-957, 958-959, 960). He also testified that Grossman at first indicated that he would plead guilty, that he pleaded not guilty on the day the case

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[9] The proceedings relating to the motions occupy almost as much space in the record as the trial itself. Compare R. 30-594 with R. 595-1026.

was first set for trial, and finally changed his plea to guilty on advice of his attorney (R. 956-957, 962, 964, 965, 966, 967-970). During this time, both Grossman and his attorney made frequent efforts to ascertain what the sentence would be but no commitment was ever made, and it was not until the day of sentence that Grossman or his attorney knew what the prosecutor's recommendation would be (R. 957, 958, 959, 963, 970, 971, 976-979). Grossman testified at the hearing that he was not using narcotics at the time of the trial (R. 724, 727, 760), and that the prosecutor did not make any commitment to him concerning the punishment that he would receive in the event he pleaded guilty (R. 728). He also denied making the statements attributed to him by defense attorney Burke in the latter's affidavit in support of the motion for a new trial (R. 730-734). Thus, under the principles announced in *United States* v. *Johnson,* 327 U. S. 106, there was no basis upon which the Court of Appeals would have been justified in reversing the action of the trial court in denying the motions.

CONCLUSION

For the reasons stated, we respectfully submit that the petitions for writs of certiorari should be denied.

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